

# Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief

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## NOTE

### ADMINISTRATIVE INJUNCTIONS: ASSESSING THE PROPRIETY OF NON-CLASS COLLECTIVE RELIEF

*Daniel J. Walkert*<sup>†</sup>

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#### INTRODUCTION

*In its primitive stages, the injunction was chancery's device for avoiding the threat or continuance of an irreparable injury to land. As time went on, it was found serviceable for other, newly acquired concerns of a growingly heterogeneous society. But legal tradition fosters the illusion that law always was what it has come to be. And so, the chancellor brought under the concept of property whatever interests he protected. Modern issues due to new complexities are thus smothered beneath the delusive simplicity of old terms.*<sup>1</sup>

*Growing governmental power and increasing administrative activity mean that judicial review will need to develop, not that it should be restricted. Those who now clamor for more restricted judicial review may be*

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<sup>†</sup> B.A., Amherst College, 1999; J.D., Cornell Law School, 2005. The author expresses gratitude to Professors Kevin Clermont and Trevor Morrison and to David Moeller, formerly of Farmers' Legal Action Group, Inc.

<sup>1</sup> FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 47 (1930) (footnote omitted).

*defending the fort and losing the country. The battleground of judicial review is already changing from the field of legislation to that of administration, and lawyers, judges, and political scientists should realize it if they do not do so now.*<sup>2</sup>

The above quotations present the two ideas that form the outermost intellectual boundaries of this Note. The first eloquently presents the problem of "reckoning" endemic to the common-law system. That is, judges are forced to fictionalize legal terms to allow the law to account for the changing society that it purports to organize and control. As a consequence, in order to crawl out from under "the delusive simplicity" of time-bound language, legal writers must periodically force the judicial system to account for changes that have already taken place. Once out in the open, these changes may be analyzed for what they are, and informed decisions can be made as to whether they are truly desirable.

The second quotation suggests the need for the judiciary itself to change. Accounting for changes in terminology and legal device is useful only insofar as the judiciary's understanding of its place in the governmental structure is current. That is, legal device and the role of the judiciary are distinct but interwoven, operating in a constantly changing conceptual framework. An account of the changes to one is incomplete without an account of the changes to the other.

The subject of this Note is the administrative injunction, an order issued by a lower federal court<sup>3</sup> against a federal agency,<sup>4</sup> which purports to provide class-wide relief in the absence of a certified class.<sup>5</sup> What is troubling about these administrative injunctions is their legislative feel; administrative injunctions in non-class actions purport to benefit entire classes of similarly situated parties extending well beyond the named plaintiffs.<sup>6</sup> Many of the opinions ordering these

<sup>2</sup> OLIVER P. FIELD, *THE EFFECT OF AN UNCONSTITUTIONAL STATUTE* 326 (1935).

<sup>3</sup> All of the cases with which this Note is concerned involve the use of injunctions by lower federal courts. Injunctions issued by the U.S. Supreme Court and by state courts raise a host of issues that are beyond the scope of this Note. For a discussion of the importance of distinguishing between lower federal courts and the Supreme Court when analyzing the scope of injunctions, see *infra* Part II.

<sup>4</sup> Again, this Note will not address the many issues that arise when federal courts issue injunctions against state governments. Much of the literature addressing that topic is concerned with the civil rights era. For a detailed discussion of these issues, see generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Frank M. Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

<sup>5</sup> See, e.g., *Bresgal v. Brock*, 843 F.2d 1163, 1169-71 (9th Cir. 1987).

<sup>6</sup> See, e.g., *Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 207 F. Supp. 2d 992 (D.S.D. 2002). This case is discussed in greater detail below.

broad injunctions entirely fail to discuss scope.<sup>7</sup> Those opinions that do discuss the scope of these administrative injunctions often appear to do so as an afterthought, citing few cases and offering only conclusory justifications.<sup>8</sup>

The lower federal courts advance little explanation for these broad mandates. There is, in fact, little law to apply that is directly on point. The role of the injunction has changed greatly since the framing of the U.S. Constitution, and much of the change has been incremental and *ad hoc*.<sup>9</sup> Furthermore, equitable remedies came into being because of a need for flexibility in the law,<sup>10</sup> and thus courts may be less concerned with providing justification when the remedies are equitable. Also, because the injunction is a highly varied genus of remedy, and because injunctions have been employed as a remedy in so many different situations, it is difficult to extract general rules of usage from the mass of cases.

Nonetheless, a reader of these cases might be struck by an odd ambivalence. On the one hand, these injunctions have a visceral appeal; it seems that an unconstitutional administrative regulation should be unenforceable against any person protected by the Constitution, regardless of geography or the incidents of an adversarial system. On the other hand, these injunctions have a legislative quality that at its best suggests some degree of judicial usurpation, and at its worst is flagrantly violative of American constitutional principles. The true state of affairs probably lies somewhere between these positions, yet the debate over the propriety of the administrative injunction generally takes place at the ideological extremes. Thus, there is a need to step back and assess the current state of the administrative injunction without falling into the stridency of either ideological commitment.

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<sup>7</sup> See, e.g., *N. Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002), *rev'd on other grounds*, 308 F.3d 198 (3d Cir. 2002).

<sup>8</sup> See, e.g., *Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365 (9th Cir. 1984). In that case, the court stated: "The INS asserts that in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs. We agree." *Id.* at 1371. The court cited three cases that were not directly on point and made no attempt to point out several crucial distinctions between the instant case and those cited. See *id.*; see also *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1205 n.31 (C.D. Cal. 1998) (confining the court's entire discussion of the scope of the injunction to a final footnote).

<sup>9</sup> See generally OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978) (arguing that the institutional reform litigation of the civil rights era spawned a new breed of injunction); FRANKFURTER & GREENE, *supra* note 1 (discussing developments in the use of injunctions in American law, specifically during the era of labor movements).

<sup>10</sup> See F. W. MAITLAND, *EQUITY* 6 (A. H. Chaytor & W. J. Whittaker eds., 1920); H. ARTHUR SMITH, *A PRACTICAL EXPOSITION OF THE PRINCIPLES OF EQUITY* 8 (3d ed. 1902) (describing equity as "dealing . . . with the exceptional and the abnormal, and being less capable of exact definition, because it is ever adapting itself to the various devices and the various needs of human nature").

A look at two recent cases in which such injunctions have been ordered will highlight the issues that will be discussed in depth below. The first of these cases, *Livestock Marketing Association v. United States Department of Agriculture*<sup>11</sup> (*LMA*), involved a challenge to an assessment program run by the United States Department of Agriculture (USDA). This program, called the "beef checkoff,"<sup>12</sup> was established by the Beef Promotion and Research Act of 1985<sup>13</sup> and implemented by the USDA to fund a program of research and generic advertising for the purpose of promoting the domestic beef industry.<sup>14</sup> The District Court of South Dakota eventually ruled the program unconstitutional on the ground that the generic advertising campaign amounted to compelled speech, and that, as such, it violated the First Amendment rights of cattle producers.<sup>15</sup> The district court enjoined the Department of Agriculture from enforcing any provision of the Beef Act as to any beef producer nationwide.<sup>16</sup> The court explicitly denied the government's request to limit the holding to the named plaintiffs, stating: "To so limit the holding would only encourage numerous other producers, importers, and other sellers of beef on the hoof to file additional lawsuits in this and other federal jurisdictions."<sup>17</sup> This decision was affirmed on appeal in the Eighth Circuit Court of Appeals.<sup>18</sup> The Eighth Circuit dedicated only two sentences to the scope of the injunction, saying that the "district court did not abuse its discretion in fashioning its relief" and that "our holding that the Beef Act is unconstitutional is not limited solely to the plaintiffs in the present case."<sup>19</sup>

A second recent case involving the use of an administrative injunction is *Mainstream Marketing Services, Inc. v. Federal Trade Commission*.<sup>20</sup> This case also involved a First Amendment challenge, focusing

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<sup>11</sup> 207 F. Supp. 2d 992 (D.S.D. 2002). This decision is actually the second under this name, the first having resulted in a preliminary injunction for the plaintiffs. See *Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 132 F. Supp. 2d 817 (D.S.D. 2001). Shortly after that decision, the Supreme Court struck down a similar government checkoff program on broader First Amendment grounds in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). The plaintiffs in *LMA* were subsequently granted leave by the district court to amend their complaint to include the grounds upon which *United Foods* was decided. See *Livestock Mktg. Ass'n*, 207 F. Supp. 2d at 996.

<sup>12</sup> This program is called the "beef checkoff" because a beef producer must prove that she has paid the assessments before the USDA will certify, or "check off," her beef.

<sup>13</sup> Pub. L. No. 99-198, § 1601, 99 Stat. 1354 (codified at 7 U.S.C. §§ 2901-2911 (2004)).

<sup>14</sup> See 7 C.F.R. §§ 1260.101-1269.217 (2004).

<sup>15</sup> See *Livestock Mktg. Ass'n*, 207 F. Supp. 2d at 1002.

<sup>16</sup> See *id.* at 1007-08.

<sup>17</sup> *Id.* at 1007.

<sup>18</sup> *Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711, 772 (8th Cir. 2003).

<sup>19</sup> *Id.*

<sup>20</sup> 283 F. Supp. 2d 1151 (D. Colo. 2003), *rev'd on other grounds*, 358 F.3d 1228 (10th Cir. 2004).

on the constitutionality of the so-called do-not-call list. The Federal Trade Commission (FTC) created the list pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act,<sup>21</sup> which granted the Commission authority to "prescribe rules prohibiting deceptive telemarketing acts or practices."<sup>22</sup> After promulgation of the Telemarketing Sales Rules,<sup>23</sup> which established the "do-not-call" registry, two telemarketing companies and a professional association challenged the Rules in the District of Colorado. The plaintiffs sought declaratory and injunctive relief,<sup>24</sup> claiming that the do-not-call list represented a content-based restriction on speech in violation of the First Amendment.<sup>25</sup> The district court agreed with the plaintiffs and permanently enjoined the FTC from enforcing the do-not-call list against any telemarketer nationwide.<sup>26</sup>

Other recent cases contain similar decrees,<sup>27</sup> raising issues about the propriety of lower federal courts granting class-wide relief in non-class actions. While no blanket rule could adequately address the various issues that arise in these cases, some sort of analytical structure might be valuable to future litigants and lawmakers. Certain questions surface and resurface in these cases: Who in the class of beneficiaries may enforce these broad injunctions? Is it appropriate for lower federal courts to foreclose litigation of important policy issues in other circuits? Is nationwide uniformity<sup>28</sup> or individualized justice the goal of public litigation?

The answer to these questions is: it depends. The propriety of these injunctions is dependent upon the facts of the particular case. Broad injunctions appropriate to remedying First Amendment violations may be overbroad in remedying specific due process violations, yet the cases are cited interchangeably as if such injunctions apply seamlessly across substantive boundaries. In general, the courts should be aware of the nature of the rights being remedied, the nature of the violation being enjoined, the nationwide policy concerns

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<sup>21</sup> Pub. L. No. 103-297, 108 Stat. 1545 (codified at 15 U.S.C. §§ 6101-6108 (2004)).

<sup>22</sup> 15 U.S.C. § 6102 (2004).

<sup>23</sup> 16 C.F.R. §§ 310.3-310.4 (2003).

<sup>24</sup> See *Mainstream Mktg. Servs.*, 283 F. Supp. 2d at 1158.

<sup>25</sup> See *id.* at 1159.

<sup>26</sup> See *id.* at 1168. The Tenth Circuit, however, later reversed this decision and upheld the do-not-call list. See 358 F.3d 1228 (2004).

<sup>27</sup> See, e.g., *N. Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288, 305 (D.N.J. 2002) (enjoining implementation of an administrative directive that would have applied to any media group nationwide), *rev'd on other grounds*, 308 F.3d 198 (3d Cir. 2002); see also *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 19 (D.D.C. 2004) (issuing a permanent injunction enjoining the Department of Defense from inoculating employees with the anthrax vaccine without the employees' consent).

<sup>28</sup> Cf. *United States v. Stone & Downer Co.*, 274 U.S. 225, 236 (1927) (stating that collateral estoppel does not apply where inconsistent judgments "would lead to inequality in the administration of the customs law").

of federal agencies and the federal judiciary, and the contours of the potential class of beneficiaries. Courts should also consider ethical issues in cases of informal class-wide representation.<sup>29</sup> Nevertheless, the courts often fail to address these issues in a coherent fashion.

Part I of this Note will trace the development of the use of the injunction in the federal courts, from its roots in the English courts of equity, through the American labor and civil rights movements, to the current role of the injunction in the modern regulatory state. Part II will discuss the ongoing debates in the federal courts over the propriety of these injunctions, with particular attention paid to the few Supreme Court cases that offer some guiding principles and the lower court cases that attempt to bring order to this disorderly field. Because the courts that discuss the scope of these injunctions cite few cases and often contain only conclusory explanations, Part III is an attempt to sort out the various principles informing these decisions.

## I

### THE ADMINISTRATIVE INJUNCTION IN HISTORICAL PERSPECTIVE

This Part is not meant to present a comprehensive history of equity in general or injunctions in particular. Many imposing volumes accomplish that task well.<sup>30</sup> Instead, this Part hopes to accomplish, through this brief history, three separate-but-related tasks. First, as the injunction is an equitable remedy, in order to understand the current state of injunctions one must understand at least something of its ancient roots.<sup>31</sup> Thus, this Part maps out the history of injunctions from its English origins to the present day. Second, this Part hopes to isolate certain concepts encoded in the very nature of equity jurisprudence that continue to express themselves in current judicial opinions. The qualities that continue to play a role in the use of injunctions are flexibility,<sup>32</sup> prospectivity,<sup>33</sup> and individua-

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<sup>29</sup> See generally Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (suggesting that situations of non-class collective representation leave lawyers uncertain about whether they owe their loyalty to an individual client or to the larger collective).

<sup>30</sup> The principal works that I relied on in researching equity and injunctions are the following: OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* (2d ed. 1984); MAITLAND, *supra* note 10; THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (1956); JOHN NORTON POMEROY, JR., *EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES* (1905); EDWARD D. RE & JOSEPH R. RE, *CASES AND MATERIALS ON REMEDIES* (4th ed. 1996); JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* (A. E. Randall ed., 3d ed. 1920); Walter Wheeler Cook, *The Powers of Courts of Equity*, 15 COLUM. L. REV. 37 (1915); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003).

<sup>31</sup> See MAITLAND, *supra* note 10, at 2 ("[F]or the mere purpose of understanding the present state of our law, some history becomes necessary.").

<sup>32</sup> See *id.* at 4-6, 8-9, 254.

<sup>33</sup> See *id.* at 254-56, 259; 1 JAMES L. HIGH, *A TREATISE ON THE LAW OF INJUNCTIONS* 3, 38-39 (Shirley T. High ed., 4th ed. 1905); Chayes, *supra* note 4, at 1292-95 (noting that

tion.<sup>34</sup> Understanding these qualities is the key to understanding both the troubling and the beneficial aspects of the administrative injunction. Third, and perhaps most importantly, a look at the history of the injunction in the American legal system shows that the current use of the administrative injunction was inevitable.<sup>35</sup> This Note attempts to accept this inevitability and move past it, illuminating the various problems and advantages inherent in the use of the administrative injunction and establishing a coherent method for analyzing them.

### A. English Roots

The notion of equity as a necessary component of justice long predates the Anglo-American legal system.<sup>36</sup> The seeds of the equity jurisprudence that still survive in American law were sown in England during the reign of Edward I as a means of circumventing the notorious rigidity of the common-law courts.<sup>37</sup> The courts of equity originated in the administrative office of the Chancery, which was headed by the Chancellor.<sup>38</sup> Generally, the Chancellor was a bishop in the Catholic Church and the king's closest advisor.<sup>39</sup> The duties of the courts of equity were originally interstitial.<sup>40</sup> That is, in the beginning the Chancery did not offer direct relief, but instead would issue new writs to be taken to the courts of law.<sup>41</sup> The writ system of the common-law courts was intended to foster form and predictability, but the consequent procedural rigidity also tended to work injustice in certain individual cases.<sup>42</sup> Parties who believed they were wronged, but who had no recourse in the courts of law,<sup>43</sup> originally applied to

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"the prospective character of [injunctions] introduces large elements of contingency and prediction into the proceedings").

<sup>34</sup> See SMITH, *supra* note 10, at 8 (describing equity's flexibility as "ever adapting itself to the various devices and the various needs of human nature").

<sup>35</sup> See, e.g., FRANKFURTER & GREENE, *supra* note 1, at 52 ("In truth, the extraordinary remedy of injunction has become the ordinary legal remedy, almost the sole remedy."); see also FISS, *supra* note 9, at 1-6 (arguing that *Brown v. Board of Education* should be appreciated as liberating the injunction from control of hand-wringing traditionalists).

<sup>36</sup> See, e.g., ARISTOTLE, NICOMACHEAN ETHICS (Christopher Rowe trans., Oxford Press 2002); STORY, *supra* note 30, at 1-4 (discussing notions of equity in ancient Roman law).

<sup>37</sup> See MAITLAND, *supra* note 10, at 2-6.

<sup>38</sup> *Id.* at 2.

<sup>39</sup> See *id.* at 2-3. Maitland notes that early courts of equity borrowed much procedurally from the ecclesiastical courts, which is perhaps a result of this longstanding connection between church and chancery. See *id.* at 5.

<sup>40</sup> See STORY, *supra* note 30, at 24 ("[E]quitable jurisdiction . . . was principally applied to remedy defects in the common-law proceedings[ ] . . .").

<sup>41</sup> See MAITLAND, *supra* note 10, at 3.

<sup>42</sup> See STORY, *supra* note 30, at 16-17.

<sup>43</sup> See MAITLAND, *supra* note 10, at 6. Parties seeking relief in the courts of equity were generally unable to attain redress in the courts of law either because the writ system did not recognize the particular wrong or because the party was seeking relief against a power-



the king for relief.<sup>44</sup> The king would in turn refer the requests to the Chancellor.<sup>45</sup> Over time, supplicants in need began to apply directly to the Chancellor,<sup>46</sup> and eventually "[t]he Chancellor unrolled a vast body of legal principle that we know as 'equity' to offer relief in those cases where, because of the technicality of procedure, defective methods of proof, and other shortcomings in the common law, there was no 'plain, adequate and complete' remedy otherwise available."<sup>47</sup>

Two types of relief were available from the Chancellor: a new writ or direct relief.<sup>48</sup> The Chancellor might invent a new writ as a way of meeting new substantive issues not covered by the "writs of course."<sup>49</sup> The common-law courts were hostile to these new writs as being extra-judicial, and the courts often quashed them before relief could be granted.<sup>50</sup> However, because the law was seen as deriving from the inherent power of the king,<sup>51</sup> the Chancellor, as empowered by the king, could also issue direct orders granting relief where there was no remedy at law.<sup>52</sup> It is through this system of orders that the Chancery, which began as an essentially administrative body, became part of the English judiciary.

As the Chancery's role expanded, Parliament became displeased with the free-ranging, flexible nature of the courts of equity.<sup>53</sup> Despite Parliament's disapproval, however, the courts of equity began to play an indispensable role in certain substantive areas of law.<sup>54</sup> In particular, the courts of equity were well-suited for enforcing fiduciary obligations of trusts.<sup>55</sup> Eventually, the flexibility that justified and solidified the place of equity within the law lent itself to other pursuits: remedying fraud, canceling and rectifying agreements, quieting title, ordering specific performance of a contract, and issuing injunctions

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ful nobleman who would have undue influence over the actions of the local courts. See Main, *supra* note 30, at 440-41.

<sup>44</sup> See MAITLAND, *supra* note 10, at 3.

<sup>45</sup> See *id.* at 5.

<sup>46</sup> See *id.*

<sup>47</sup> See Main, *supra* note 30, at 441-42.

<sup>48</sup> See MAITLAND, *supra* note 10, at 3.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 3-4.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* at 6.

<sup>54</sup> See *id.* at 7 (noting the development of the Chancellor's authority to "enforce uses, trusts or confidences").

<sup>55</sup> See *id.* As Maitland explained:

A system of law which will never compel, which will never even allow, the defendant to give evidence, a system which sends every question of fact to a jury, is not competent to deal adequately with fiduciary relationships. On the other hand the Chancellor had a procedure which was very well adapted to this end.

to remedy ongoing or threatened property violations.<sup>56</sup> In these areas, equity was traditionally seen as supporting and completing, but never replacing, the common law.<sup>57</sup>

Over time, due to an ever-increasing caseload and an expanding role for the courts of equity, equitable procedures and remedies became standardized.<sup>58</sup> The injunction was but one of the so-called equitable remedies, though an important one. More flexible and more widely applicable than the other equitable remedies, the injunction developed into an extremely powerful tool in the hands of the courts of equity.<sup>59</sup>

An injunction can be either prohibitory or mandatory.<sup>60</sup> In general, a prohibitory injunction is an "order made by the Court forbidding a person or class of persons from doing a certain act, or acts of a certain class, upon pain of going to prison for an indefinite time as contemnors of the Court."<sup>61</sup> In its early stages, courts used prohibitory injunctions to halt ongoing trespass, to prevent waste, to restrain alienation of certain property, and to abate nuisance.<sup>62</sup> A mandatory injunction is an affirmative order requiring a person to remedy a wrongful, existing state of affairs.<sup>63</sup> Courts most commonly used the mandatory injunction in actions to quiet title,<sup>64</sup> to enforce covenants,<sup>65</sup> and to remove obstructions interfering with another's property rights.<sup>66</sup> Of course, this list is not nearly exhaustive; indeed, as an equitable remedy, the injunction is intended for adaptation to a variety of purposes.<sup>67</sup>

Because of their flexibility, a certain level of generality is required when defining the use of injunctions. While most of the equitable remedies deal with specific substantive areas—e.g., specific property arrangements such as mortgages and trusts, or specific wrongs such as fraud and accident—injunctions operate in personam, transcend substantive boundaries, and can be directed toward a wide variety of be-

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<sup>56</sup> See *id.* at 20–21; STORY, *supra* note 30, at 17–20, 32–34.

<sup>57</sup> See MAITLAND, *supra* note 10, at 18–19 (emphasizing that "[w]e ought not to think of common law and equity as of two rival systems," for equity has always "presupposed the existence of common law").

<sup>58</sup> See *id.* at 10–11.

<sup>59</sup> See *id.* at 254.

<sup>60</sup> See *id.* at 256–57. This difference will prove to be analytically important as the use of the injunction increases over time.

<sup>61</sup> *Id.* at 254.

<sup>62</sup> See *id.* at 254–55 (providing examples of language that judges might include in such prohibitory injunctions).

<sup>63</sup> *Id.* at 257.

<sup>64</sup> See *id.* at 260.

<sup>65</sup> See *id.* at 263.

<sup>66</sup> See *id.* at 257.

<sup>67</sup> See STORY, *supra* note 30, at 367.

haviors.<sup>68</sup> Among other functions, injunctions were used to declare rights in order to prevent irreparable harm to property interests<sup>69</sup> and to eliminate the need for (or threat of) repetitive litigation.<sup>70</sup> While it is now generally accepted that irreparable harm is no longer a requirement for the issuance of an injunction,<sup>71</sup> the prevention of repetitive litigation is still commonly cited as a justification for injunctive relief.<sup>72</sup>

## B. The American Developments

While some of the original thirteen colonies created separate courts of equity and others created courts of combined jurisdiction, all of the American colonies had some working system of equity.<sup>73</sup> Though the Constitution officially and permanently transplanted equity into the new American constitutional democracy, the new states generally "administered only a rough layman's equity."<sup>74</sup> By 1820, a systematic organization of equity jurisprudence developed in both England and the United States, though not all of the American states were quick to develop a fully-formed and free standing equity jurisdiction.<sup>75</sup> Even today, equity practices vary widely at the state level.<sup>76</sup>

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<sup>68</sup> One of the most controversial and important uses of the injunction, one not centered in the first instance on a property right, was to prevent the initiation of actions in the common-law courts and the enforcement of judgments already obtained. See MAITLAND, *supra* note 10, at 257. These injunctions were intended not only to afford relief to the parties, but also to ensure the vitality of equitable decrees as well. See *id.* Eventually, the Judicature Act of 1873 abolished this use of injunctions in England, but that Act also greatly expanded and solidified the injunctive powers of the courts of equity in other matters. See *id.* at 257-59.

<sup>69</sup> See FRANKFURTER & GREENE, *supra* note 1, at 47.

<sup>70</sup> See HIGH, *supra* note 33, at 18-19 (observing that "instead of permitting the parties to be harassed by a multiplicity of suits," an injunction can serve to "determine the whole matter in one action").

<sup>71</sup> See generally DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991) (detailing the ways in which the jurisprudence of injunctions no longer views irreparable injury as a prerequisite to granting relief).

<sup>72</sup> See, e.g., *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 207 F. Supp. 2d 992, 1007 (D.S.D. 2002). It is important to note the difference in focus. While the goal of preventing repetitive litigation originally arose to protect the parties from unnecessary burdens, it is now cited by courts concerned about conserving judicial resources.

<sup>73</sup> See WILLIAM Q. DE FUNIAK, *HANDBOOK OF MODERN EQUITY* 6-7 (2d ed. 1956); AUSTIN WAKEMAN SCOTT & SIDNEY POST SIMPSON, *CASES AND OTHER MATERIALS ON CIVIL PROCEDURE* 161-62 (3d ed. 1950). Massachusetts did not have full equity jurisdiction until 1877, though the colonial legislative and regular courts exercised partial equity jurisdiction well before the Revolution. *Id.* at 162-63.

<sup>74</sup> See SCOTT & SIMPSON, *supra* note 73, at 162 ("There was no American equity jurisprudence; the English precedents were inaccessible and not well settled, and there was in any event a hostility to all things English; many of the judges were laymen.").

<sup>75</sup> See *id.* at 162-63.

<sup>76</sup> Delaware stands as one prominent example of a state whose system of equity has still not been fully merged into its courts of law.

The framers of the Constitution settled the question of what jurisdiction the federal courts would have over suits in equity. Article III, Section 2 of the Constitution declares that "[t]he judicial Power shall extend to all Cases, in Law and Equity."<sup>77</sup> The second clause of that Section, which establishes the original jurisdiction of the Supreme Court,<sup>78</sup> impliedly gives the Court jurisdiction over both law and equity.<sup>79</sup> When the Judiciary Act of 1789 created the lower federal courts, it similarly granted jurisdiction over law and equity.<sup>80</sup> It was understood that in the state court systems that did not have separate courts of law and equity, and likewise in the federal system, the same judges would sit in both law and equity cases,<sup>81</sup> but that the substantive aspects of the cases, the remedies given, and the procedures used would be kept separate.<sup>82</sup> Legal and equitable procedure in the federal courts remained separate until the Federal Rules of Civil Procedure merged law and equity in 1938.<sup>83</sup>

### C. The Injunction in American Law

The use of the injunction in the early history of American law was not surprisingly similar to its use in English law. The courts established certain rules to cabin its use: the injunction should generally be confined to protecting rights to property;<sup>84</sup> the injunction should be used only where there is no adequate remedy at law;<sup>85</sup> and the injunction should be used to prevent irreparable injury.<sup>86</sup> Furthermore, traditionally an injunction had to state with particularity the persons to be bound and the acts to be enjoined.<sup>87</sup> Because injunctions were used to remedy ongoing violations to property rights, the scope of the injunction was traditionally very narrow.<sup>88</sup> But to call those standards "rules" belies their formlessness; as society changed, courts found that these strictures prevented the courts from achieving equity in particu-

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<sup>77</sup> U.S. CONST. art. III, § 2.

<sup>78</sup> *Id.*

<sup>79</sup> See SCOTT & SIMPSON, *supra* note 73, at 163.

<sup>80</sup> See *id.*

<sup>81</sup> See DE FUNIAK, *supra* note 73, at 7.

<sup>82</sup> See SCOTT & SIMPSON, *supra* note 73, at 163.

<sup>83</sup> See FED. R. CIV. P. I.

<sup>84</sup> See HIGH, *supra* note 33, at 108; Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 640-41 (1916).

<sup>85</sup> See HIGH, *supra* note 33, at 42-44; C. C. Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 111, 121 (1887).

<sup>86</sup> See HIGH, *supra* note 33, at 36-38.

<sup>87</sup> See FED. R. CIV. P. 65; HIGH, *supra* note 33, at 2 ("A writ of injunction may be defined as a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing.").

<sup>88</sup> See HIGH, *supra* note 33, at 3. It is true that, in one sense, injunctions were traditionally broad in that they bound not only the parties before the court, but also any persons in privity with those parties. See, e.g., FED. R. CIV. P. 65.

lar cases.<sup>89</sup> Thus, the chancellors would fictionalize terms in order to bring a case within the realm of equitable remedies.<sup>90</sup>

While change in common law often moves at glacial pace, there are moments when legal scholars and practitioners take notice of drastic and fundamental alterations of certain substantive areas of law. In the case of injunctions, there have been two major upheavals in American law: one during the labor movement,<sup>91</sup> and the other during the civil rights era.<sup>92</sup>

The most famous of the labor injunctions came in *United States v. Debs*.<sup>93</sup> In *Debs*, workers employed by the Pullman Company, a manufacturer of train cars, organized a labor strike to protest certain management decisions, including a twenty percent wage reduction.<sup>94</sup> The American Railway Union, led by Eugene Debs, agreed to help the Pullman strikers by forbidding its members to operate trains that included Pullman-made cars.<sup>95</sup> The strike was a success, and because of the economic importance of the rail transportation system, the effects of the resulting "paralysis of transportation" were felt nationwide.<sup>96</sup> The federal government soon took steps to break the strike, including obtaining an injunction that ordered Debs, the union members, "and all persons combining and conspiring with them" to cease interference with the national railway system.<sup>97</sup> The strikers refused to comply with the order, and the court charged Debs and other union leaders with contempt.<sup>98</sup> The federal judge sentenced Debs to prison for six months,<sup>99</sup> and the Supreme Court denied Debs's petition for habeas corpus relief.<sup>100</sup>

While the Supreme Court justified its decision by claiming that such use of the injunction was "recognized from ancient time and by indubitable authority,"<sup>101</sup> a closer look at labor injunctions reveals

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<sup>89</sup> See FRANKFURTER & GREENE, *supra* note 1, at 47 (noting how "[m]odern issues due to new complexities [were] smothered beneath the delusive simplicity of old terms").

<sup>90</sup> See *id.* ("[T]he chancellor brought under the concept of property whatever interests he protected.").

<sup>91</sup> See generally FRANKFURTER & GREENE, *supra* note 1 (tracing the development of the labor injunction in American courts in the late nineteenth and early twentieth century).

<sup>92</sup> See generally FISS, *supra* note 9 (discussing the use of injunctions in civil rights litigation).

<sup>93</sup> 64 F. 724 (N.D. Ill. 1894).

<sup>94</sup> See FRANKFURTER & GREENE, *supra* note 1, at 18.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.*

<sup>97</sup> See *Debs*, 64 F. at 726.

<sup>98</sup> FRANKFURTER & GREENE, *supra* note 1, at 19.

<sup>99</sup> *Id.*

<sup>100</sup> *In re Debs*, 158 U.S. 564, 600 (1895).

<sup>101</sup> See *id.* at 599. But see FRANKFURTER & GREENE, *supra* note 1, at 20-24 (discussing the dubious pedigree of this "indubitable authority").

that the injunction had drifted far from its historical moorings.<sup>102</sup> Though courts traditionally used injunctions to remedy ongoing violations of property interests such as trespass, waste, and nuisance, the federal courts began to issue injunctions against labor unions around the end of the nineteenth century as a way of controlling labor unions and fostering the growth of American industry.<sup>103</sup>

The labor injunctions broke the traditional rules governing injunctions in several notable ways. The labor injunctions expanded the notion of property well beyond its traditional confines.<sup>104</sup> Also, while injunctions traditionally were narrow remedies, the labor injunctions were very broad in terms of the acts proscribed<sup>105</sup> and the number of people bound.<sup>106</sup> Furthermore, equitable remedies traditionally could not be obtained where there would be adequate remedy available at law.<sup>107</sup> Nonetheless, the labor injunctions generally drew upon the authority of criminal statutes, so that criminal prosecution could have addressed many of the strikes.<sup>108</sup> The courts were willing to expand these injunctions beyond their historical confines because the injunction's power, flexibility, and prospectivity made the device uniquely suited to protect the interests of business from disruptive labor movements.

The civil rights injunction, the tool of so-called institutional reform litigation, represented an even more radical departure from the traditional use of the injunction.<sup>109</sup> The second *Brown v. Board of Education*<sup>110</sup> (*Brown II*) decision is perhaps the most famous of these injunctions. Acting upon the authority of the first *Brown v. Board of Education* decision<sup>111</sup> (*Brown I*), the Supreme Court directed lower federal courts in the districts in which the plaintiffs lived to administer

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<sup>102</sup> See FRANKFURTER & GREENE, *supra* note 1, at 20–21.

<sup>103</sup> See *id.* at 20–24. Early labor injunctions were often issued under a fictionalized notion of nuisance, yet nuisance law “is not a very happy or adequate concept from which to evolve law for regulating the clash of conduct in modern industrial relations.” *Id.* at 20.

<sup>104</sup> See *id.* at 47–48.

<sup>105</sup> See *id.* at 89–105 (discussing labor injunctions’ use of restraining clauses of “vague and harassing significance”).

<sup>106</sup> See *id.* at 86–89 (providing examples, including *Debs*, in which courts extended the scope of labor injunctions beyond the litigants themselves).

<sup>107</sup> See HIGH, *supra* note 33, at 42–44; Langdell, *supra* note 85, at 121; see also HIGH, *supra* note 33, at 29–33 (advocating the traditional view that courts should not grant injunctions to prevent criminal acts).

<sup>108</sup> See FISS, *supra* note 9, at 41; FRANKFURTER & GREENE, *supra* note 1, at 5–11, 150–98 (discussing the effect of various federal statutes upon labor injunctions, including the Interstate Commerce Act, Clayton Act, and Sherman Act).

<sup>109</sup> See FISS, *supra* note 9, at 4 (noting that civil rights issues such as school desegregation “not only gave the injunction a greater currency, [but] also presented the injunction with new challenges, in terms of both the enormity and the kinds of tasks it was assigned”).

<sup>110</sup> 349 U.S. 294 (1955).

<sup>111</sup> 347 U.S. 483 (1954).

the complex, long-term process of school desegregation.<sup>112</sup> This established school desegregation as one of the "prime litigative chores of the courts in the period 1954-1974."<sup>113</sup> The extraordinary nature of this task required the courts' to stretch their injunctive powers well beyond their historical limits.

Whereas the labor injunction made at least a fictionalized attempt to fall within the traditional confines of injunction jurisprudence,<sup>114</sup> the civil rights injunction made no such attempt. The rights protected were civil rights, not property rights,<sup>115</sup> and there were no maxims, rules, or common bits of wisdom that suggested how injunctions might be applied to this relatively new field of jurisprudence.<sup>116</sup> This was not merely a stretching of traditional notions of the injunction, but represented an entirely new field of application.<sup>117</sup>

Injunctions were uniquely suited to civil rights litigation because they allowed for an ongoing relationship between the courts and the institutions whose conduct the courts were regulating.<sup>118</sup> The injunction was thought to be an acceptable remedy when systemic problems were so great that traditional democratic processes were no longer adequate protections of constitutional rights.<sup>119</sup> Thus, civil rights injunctions were broad in scope in terms of the beneficiaries,<sup>120</sup> acts mandated,<sup>121</sup> and persons bound.<sup>122</sup> This breadth raised serious concerns about federalism and the role of the judiciary.<sup>123</sup>

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<sup>112</sup> See *Brown II*, 349 U.S. at 301 ("[T]he cases are remanded to the District Courts to take such proceedings . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.").

<sup>113</sup> Fiss, *supra* note 9, at 4 (noting that "in these cases the typical remedy was the injunction").

<sup>114</sup> See FRANKFURTER & GREENE, *supra* note 1, at 47-48 (explaining how early labor injunctions were couched in terms of protecting the parties' property rights).

<sup>115</sup> See Fiss, *supra* note 9, at 40-42 (discussing how the traditional limitation of injunctions to actions involving property rights was eroded by the development of labor and civil rights injunctions).

<sup>116</sup> See DE FUNIAK, *supra* note 73, at 4, 140-48 (discussing how injunctions may be implemented by courts to protect civil, social, and political rights).

<sup>117</sup> See Fiss, *supra* note 9, at 9-12 (suggesting that, unlike the traditional "preventive" property-based injunction, civil rights injunctions serve "structural" and "reparative" functions).

<sup>118</sup> See *id.* at 28; Chayes, *supra* note 4, at 1298; Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 27-28 (1979).

<sup>119</sup> See Fiss, *supra* note 9, at 88-90; Chayes, *supra* note 4, at 1294-95 (noting that "the fundamental conception of litigation as a mechanism for private dispute settlement is no longer viable" in cases affecting public policy issues such as civil rights).

<sup>120</sup> See Fiss, *supra* note 9, at 14-15 ("The beneficiary of the typical civil rights injunction is not an individual . . . rather it is a social group . . .").

<sup>121</sup> See Nagel, *supra* note 4, at 708 (providing examples of extremely detailed decrees crafted by the Supreme Court based upon its interpretation of constitutional requirements).

<sup>122</sup> See Fiss, *supra* note 9, at 15-18.

<sup>123</sup> See generally LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976) (questioning the role of the courts in the context of the

#### D. The Administrative Injunction

The administrative injunction represents yet another fundamental change in the law of injunctions. This change has come about slowly for a number of possible reasons. First, the slow rate of change may be the result of the traditional incremental method of change in the common law. Second, the administrative state itself is relatively new, at least in its currently pervasive form.<sup>124</sup>

It is important to note the way in which the administrative injunction differs from its predecessors. Like the labor and civil rights injunctions, the administrative injunction is not concerned primarily with remedying property rights.<sup>125</sup> Unlike the labor injunction and civil rights injunction, the administrative injunction is not broad as to the parties bound; similar to the civil rights injunction, however, the administrative injunction is, by definition, broad as to the beneficiary class.<sup>126</sup> Finally, in contrast to the civil rights injunction, the administrative injunction is often relatively specific as to the acts being enjoined, and there is rarely a structural, or ongoing, aspect to the administrative injunction.

One important, if nebulous, similarity between the civil rights and administrative injunctions is the normative role of the judiciary.<sup>127</sup> This is perhaps the root of the controversies surrounding the

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civil rights cases, particularly whether the courts properly exercised the judicial power by imposing structural injunctions requiring integration of schools); Nagel, *supra* note 4 (analyzing concerns that broad injunctions by federal courts violate separation of powers principles and infringe upon the sovereignty of state governments). *But see* Fiss, *supra* note 9, at 61–68 (arguing that many of the federalism concerns are misplaced); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (arguing that many of the perceived extraordinary uses of the injunction in the institutional litigation of the civil rights era had solid historical precedent).

<sup>124</sup> The seeds of concern may have been sown shortly after the New Deal began. *See, e.g.,* FIELD, *supra* note 2, at 326 (recognizing in 1935 that “[t]he battleground of judicial review [was] already changing from the field of legislation to that of administration”). Nevertheless, courts and commentators today have yet to attempt to harmonize the obvious tones of dissonance between the judiciary and the administrative agencies.

<sup>125</sup> The labor injunction, however, is closely linked with concepts of property, and the administrative injunction may also implicate property rights. *See, e.g.,* Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs, 145 F.3d 1399 (D.C. Cir. 1998). While the issue before the court in *National Mining* was the Corps’ licensing policies, the underlying concerns were closely associated with notions of nuisance or other invasions of the plaintiffs’ property rights. *Id.* at 1402–03. Nevertheless, the rights at issue in most administrative injunction cases are not property rights in any traditional sense.

<sup>126</sup> Many of the civil rights cases were brought as class actions under Rule 23(b)(2) of the Federal Rules of Civil Procedure. For a discussion of some of these cases, see Federal Rules of Civil Procedure Rule 23(b)(2) advisory committee’s note (1966). This Note defines an “administrative injunction” as one offering class-wide benefits in the absence of a certified class, representing an important procedural distinction between the civil rights injunction and its administrative counterpart.

<sup>127</sup> *See* Chayes, *supra* note 4, at 1284, 1302; Fiss, *supra* note 118, at 2–3.



use of administrative injunctions and a product of the great shift in the perceived role of the judge that took place during the civil rights era.<sup>128</sup> This paradigm envisions the federal judge as the proclaimer of the limits and normative goals of public law,<sup>129</sup> a shift from a traditional bipolar to a more polycentric and legislative view of adjudication.<sup>130</sup> If one believes that the court's equitable remedial powers are inherent, then this shift in role would explain, and even validate, the shifting role of the injunction. On the other hand, if one believes that the court's equitable remedial powers should be constrained by historical substantive limitations, then the current use of injunctions would represent troubling violations of important principles of constitutional separation of powers and federalism.

## II

### THE ADMINISTRATIVE INJUNCTION IN LEGAL PERSPECTIVE

Few court decisions discuss the propriety of the administrative injunction, and those that do often lack clarity. Furthermore, the cases cited by courts to support or argue against the use of administrative injunctions are often inapposite. This lack of clarity leads to unpredictability, which is harmful for potential plaintiffs, administrative agencies, and the courts. There are, however, certain Supreme Court cases that lend prudential principles to the arguments for and against broad non-class collective relief. This Part also details the various arguments made in the lower federal courts both for and against the use of administrative injunctions.

#### A. The Supreme Court Cases

One of the cases most often cited for the proposition that administrative injunctions should not be extended to benefit nonparties is *United States v. Mendoza*.<sup>131</sup> *Mendoza* held that nonmutual offensive collateral estoppel<sup>132</sup> does not apply *against* the government in the federal courts.<sup>133</sup> The Court's reasoning, if not the holding itself, makes *Mendoza* an appropriate guidepost in a discussion of the scope of injunctions. In a sense, injunctions that prospectively benefit per-

<sup>128</sup> See Chayes, *supra* note 4, at 1284 (noting that "the trial judge has increasingly become the creator and manager of complex forms of ongoing relief" in public law litigation).

<sup>129</sup> See Fiss, *supra* note 118, at 29-31 (arguing that the function of courts is to "give meaning to our public values" and "enforce and create society-wide norms").

<sup>130</sup> See *id.* at 39-44 (criticizing the view of scholars, such as Lon Fuller, that courts could not competently perform "polycentric" tasks).

<sup>131</sup> 464 U.S. 154 (1984).

<sup>132</sup> See *id.* at 159 n.4 ("Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party." (emphasis added)).

<sup>133</sup> See *id.* at 162.

sons not parties to the original action function in the same way as nonmutual offensive collateral estoppel. The essential reason for the decision in *Mendoza* was that the federal government does not have the same interest or stake in a suit as does a private litigant;<sup>134</sup> the Court thus reasoned that foreclosing the use of nonmutual offensive collateral estoppel against the government would "better allow thorough development of legal doctrine by allowing litigation in multiple forums."<sup>135</sup> In particular, the Court found that allowing such use of estoppel would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue"<sup>136</sup> and would deny the Supreme Court the benefit of having the chance to review the decisions of several courts of appeals.<sup>137</sup>

The opinion in *Mendoza* was essentially a policy argument for limiting the equitable discretion of the courts in a particular situation. The decision said nothing of the *power* of the courts, and it reinforced the legitimacy of applying nonmutual offensive collateral estoppel when the litigants are private parties.<sup>138</sup> Thus, in applying these policy arguments to the use of injunctions, courts should be asking whether the arguments apply with the same force. The lower courts often recite these policy reasons without distinguishing either between the facts of their cases and the facts of *Mendoza* or between the nature of collateral estoppel and the nature of injunctions.

*Califano v. Yamasaki*<sup>139</sup> is another Supreme Court decision often cited for the proposition that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."<sup>140</sup> For several reasons, however, it is misleading to rely upon *Califano* in discussing the appropriate scope of an administrative injunction. First, *Califano* was brought as a class action.<sup>141</sup>

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<sup>134</sup> See *id.* at 159 (explaining that the government is different from a private litigant "both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates"). Another reason implicit in the decision, though not given voice by the Court, is that the use of nonmutual collateral estoppel will, over time, put the government at a serious probabilistic disadvantage. See, e.g., Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612 (1978) (using probability theory to discuss and reject the abandonment of mutuality of estoppel).

<sup>135</sup> *Mendoza*, 464 U.S. at 163.

<sup>136</sup> *Id.* at 160.

<sup>137</sup> *Id.*

<sup>138</sup> See *id.* at 159.

<sup>139</sup> 442 U.S. 682 (1979).

<sup>140</sup> *Id.* at 702.

<sup>141</sup> *Id.* at 688, 689. One class consisted of social security recipients residing in Hawaii whose benefits were subject to adjustment without notice or hearing; the district court had also certified a nationwide class of individuals whose benefits could be adjusted without notice and opportunity to be heard. *Id.* at 689. The Ninth Circuit consolidated the two cases on appeal. *Id.* at 690.

Thus, its discussion of the feasibility of class-wide injunctive relief essentially turned on the propriety of the district court's certification of the class in the first instance.<sup>142</sup> The Court found that the district court had properly certified the class under Rule 23(b)(2)<sup>143</sup> and that nothing in the Rule limited the geographical scope of such a decision.<sup>144</sup> The Court thus held that the scope of injunctive relief was properly "dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."<sup>145</sup>

Several of the unsuccessful arguments in *Califano* against allowing nationwide class relief anticipate the government's arguments in *Mendoza* against the use of nonmutual offensive collateral estoppel. That is, a decision in the first instance could "foreclose[ ] reasoned consideration of the same issues" in other circuits.<sup>146</sup> Also, the government claimed that allowing nationwide classes puts undue pressure on the dockets "by endowing with national importance issues that, if adjudicated in a narrower context, might not require [the Court's] immediate attention."<sup>147</sup>

There are, however, several important distinctions between the issues presented in *Califano* and in *Mendoza*. First, because *Califano* was brought as a class action, an adverse decision would bind the entire class; in terms of collateral estoppel, the preclusion would be mutual. In *Mendoza*, on the other hand, a decision adverse to a single plaintiff would not bind future plaintiffs, yet the government would always be at risk of an adverse decision with preclusive effects in future actions involving nonparties.

Second, the *Califano* Court relied on the various protections inherent in the class certification procedure to protect against judicial usurpation. The Court held that class-wide relief is entirely appropriate where "[t]he issues involved are common to the class as a whole"<sup>148</sup> and "turn on questions of law applicable in the same man-

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<sup>142</sup> *Id.* at 698-704.

<sup>143</sup> *Id.* at 700-01 (finding that "[t]he issues involved are common to the class as a whole" and that "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23").

<sup>144</sup> *Id.* at 702.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 701-02.

<sup>147</sup> *Id.* at 702. This same argument was expressed in the *Mendoza* decision. See *United States v. Mendoza*, 464 U.S. 154, 161 (1984). In *Mendoza*, the concern focused not upon the potential burden to the courts' dockets, but upon the executive's ability to choose which cases it would appeal. That is, allowing the use of nonmutual offensive collateral against the government would essentially force the government to appeal every adverse decision for fear of preclusive effect in future enforcement actions. See *supra* notes 135-37 and accompanying text.

<sup>148</sup> *Califano*, 442 U.S. at 701.

ner to each member of the class.”<sup>149</sup> Having found that the district court did not abuse its discretion in certifying the class,<sup>150</sup> the *Califano* Court found that nothing logically or legally foreclosed injunctive relief for the entire class of plaintiffs.<sup>151</sup> Thus, the propriety of relief was very much tied to whether the initial class certification had been valid.

A third case that makes its way into this debate is *Lujan v. National Wildlife Federation*.<sup>152</sup> In particular, those who wish to justify the use of injunctions that benefit similarly situated nonparties point to Justice Blackmun’s dissent.<sup>153</sup> A portion of the dissent discusses the appropriate scope of relief when a court strikes down an administrative action.<sup>154</sup> In particular, Blackmun contended that, when a court strikes down a “generally lawful” agency action as it is applied to one particular party in one particular instance, relief should be confined to that party.<sup>155</sup> In other instances, where an administrative program of general application must be struck down, injunctive relief may properly benefit persons not parties to the action.<sup>156</sup> In those instances, broader relief will be justified by the “programmatic” nature of the claim.<sup>157</sup>

Several important distinctions should be noted between *Lujan* and the current administrative injunction cases. First, one of the important issues in the administrative injunction cases is that the *lower* federal courts are issuing these sweeping orders. Of course, many of the problems arising from the issuance of administrative injunctions are obviated when the Supreme Court strikes down an administrative action. In that situation, the scope of the precedential force of the

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 706.

<sup>151</sup> *See id.* at 705–06.

<sup>152</sup> 497 U.S. 871 (1990).

<sup>153</sup> *Id.* at 912 (Blackmun, J., dissenting). This is, of course, dictum for precedential purposes, but at least one federal judge feels that Blackmun is speaking for the entire Court as to this particular point. *See* *Zepeda v. INS*, 753 F.2d 719 (9th Cir. 1985). Furthermore, it does appear from the *Lujan* opinion that the points raised by Blackmun may be settled as far as the Supreme Court is concerned.

<sup>154</sup> *See Lujan*, 497 U.S. at 913. One of the debates taking place in *Lujan* is over the precise contours of “agency action.” Although the specifics of the debate go beyond the boundaries of this Note, some idea of the term’s meaning is essential to any understanding of the appropriate scope of relief. In *Lujan*, the majority of the Court suggested that there is a threshold of coherence that a party challenging the agency action must clear in obtaining judicial review. *See id.* at 890 (finding that the land withdrawal “program” administered by the Department of the Interior was too formless to constitute an “agency action” for the purposes of judicial review). Once that threshold is cleared, relief should be tailored to the sweep of the agency action, allowing specific relief for specific violations and programmatic relief for systemic wrongdoing. *See id.* at 894 (advocating a case-by-case approach to relief).

<sup>155</sup> *See id.* at 913 (Blackmun, J., dissenting).

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

decision and the scope of the injunction are congruent, and concerns of preserving an administrative agency's prerogative of intercourt nonacquiescence fall away. Second, the *Lujan* dissent does not stand for the proposition that class-wide injunctive relief is appropriate whenever an agency program is struck down. Blackmun merely says that the existence of incidental nonparty beneficiaries when an agency program is struck down does not render relief overbroad.<sup>158</sup> Thus, the dissent does not argue that broad relief *must* be given when an agency action is struck down, but that broad relief *may* be given when an agency program is invalidated.<sup>159</sup> Third, the dissent addresses neither the use of injunctions in general, nor whether class-wide injunctive relief is appropriate in the absence of a certified class of plaintiffs.

Although none of these three oft-cited cases is directly on point, each introduces various prudential concerns that the courts of first instance should consider in setting the scope of injunctive relief. *Califano* suggests that the courts should apply a narrowing presumption when determining the scope of administrative injunctions.<sup>160</sup> If the court is willing to consider the propriety of class-wide relief when there is a certified class of plaintiffs, then surely a court should consider whether such relief is appropriate in the absence of a certified class. *Califano* also suggests that in cases in which a class has been certified, a reviewing court should give deference to the district court's decision to offer broader relief.<sup>161</sup> *Mendoza* suggests that courts employing broad remedies (estoppel or injunctions) should be aware of the national policy concerns of both the judicial and executive branches.<sup>162</sup> The lower courts should consider whether the judicial system would benefit from litigation of an issue in multiple circuits.<sup>163</sup> If so, class-wide relief may not be appropriate. Likewise, the executive could benefit from a policy changing incrementally over time, without the risk of national policy being suddenly altered by a single adverse district court decision.<sup>164</sup> While the *Lujan* dissent suggests that broad programmatic relief may be available and appropriate, it cautions courts to assess the extent of the agency action and the nature of the right being protected in fashioning the appropriate relief.<sup>165</sup> Taken together, these cases acknowledge the availability of

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<sup>158</sup> See *id.*

<sup>159</sup> See *id.* This point was part of a much larger debate about the contours of "administrative action" in determining the availability of judicial review.

<sup>160</sup> See *Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979).

<sup>161</sup> See *id.* at 705.

<sup>162</sup> See *United States v. Mendoza*, 464 U.S. 154, 160-61 (1984).

<sup>163</sup> See *id.*

<sup>164</sup> See *id.* at 160.

<sup>165</sup> See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting).

broad relief but caution that it should be as narrow as is feasible while affording the plaintiff full relief. These decisions also suggest that certain policy factors extending beyond the instant case should be considered.

## B. The Lower Courts

A number of cases in the lower federal courts have discussed the appropriate scope of administrative injunctions. These cases argue both for and against these injunctions, but, unfortunately, most of these cases argue their positions stridently and without properly differentiating between the case at hand and the precedent they cite. This section of the Note analyzes a group of representative cases, divided generally into those advocating for the granting of class-wide relief in the absence of a certified class action and those advocating for narrower relief restricted to the parties before the court. These cases can be further divided into subgroups based on the nature of the rights asserted, who is bound by the injunction, and the type of relief requested. Despite this attempt at classification, the reader should be warned that the courts follow no coherent analytical format in assessing the appropriate scope of relief, and many of the arguments on either side are the same. Thus, the purpose of this section is to illuminate the arguments both for and against broad relief.

### 1. *Cases Allowing Broad Relief*

As an initial matter, when granting broad relief, courts generally begin by stating that "there is no general requirement that an injunction affect only the parties in the suit."<sup>166</sup> This has always been true of the court's equity powers. Rule 65 explicitly recognizes that an injunction may bind those in privity with parties before the court,<sup>167</sup> and the modern history of the injunction countenances numerous instances in which an injunction's beneficiaries have reached far beyond the parties to the suit.<sup>168</sup> There are, of course, limits on that broad power, and the courts have been counseled to exercise discretion in granting

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<sup>166</sup> See *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1988) (citing *Evans v. Harnett County Bd. of Educ.*, 684 F.2d 304, 306 (4th Cir. 1982), and *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373-74 (5th Cir. 1981)). It is interesting that the *Bresgal* court offered these two decisions to support this proposition because (1) they are from different circuits, (2) they are both Title VII employment discrimination cases, and (3) they are both cases in which federal courts considered enjoining a state agency and a private company.

<sup>167</sup> See FED. R. CIV. P. 65(d).

<sup>168</sup> The civil rights era produced many instances where injunctions affected nonparties to an action. If one acknowledges that at least some of these injunctions were proper, then one must accept the general principle that courts have the power to grant such relief. See *supra* notes 114-17, 120-22 and accompanying text.

such relief.<sup>169</sup> Their opinions tend to offer little in the way of principled policy arguments as to why broad relief is or is not appropriate in a given situation. The courts do tend to focus on three main concerns, however, when determining whether or not broad relief is appropriate in a given case.

First, the courts often repeat the prudential concern that class-wide or nationwide relief should be no "more burdensome than necessary to redress the complaining parties."<sup>170</sup> This argument, of course, means little without some notion of what complete relief to the parties entails or what kind of relief is more or less burdensome than another. Also, while this seems to be a narrowing principle, the courts that grant broad relief tend to focus more on the "redress" aspect than the "no more burdensome" aspect.<sup>171</sup>

Second, the courts often stress that class-wide relief will eliminate the need for repetitive litigation concerning a particular agency action, yet this argument seems to cut both ways. On one hand, prevention of duplicative litigation is a legitimate concern of the courts.<sup>172</sup> An agency's choice to pursue policies in one circuit that have been deemed unconstitutional in another circuit invites the affected parties to sue over issues that have already been litigated, consuming large amounts of scarce judicial and administrative resources.<sup>173</sup> On the other hand, the prerogative of agency intercircuit nonacquiescence is

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<sup>169</sup> See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (noting that "it has long been held that an injunction is 'to be used sparingly, and only in a clear and plain case'" (quoting *Irwin v. Dixon*, 50 U.S. (9 How.) 10, 33 (1850))).

<sup>170</sup> See *Bresgal*, 843 F.2d at 1170 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979)). Citing *Califano* for this proposition is misleading, however, both because *Califano* was brought as a class action with a certified nationwide class and because it is a Supreme Court case. Thus, the fact that *Califano* has intercircuit binding effect is the result of res judicata and stare decisis, not of the injunction itself. That is, once the district court properly certified the class, the decision bound all the parties in that class anywhere in the country. In addition, because it is a decision of the highest court, the precedential effect is nationwide. Thus, even if *Califano* did not grant class-wide relief, it is hard to imagine that an administrative agency would choose to apply the same law to any similarly situated person in contradiction of Supreme Court opinion. Even if the agency were not bound as to that individual by the previous judgment, the agency would be showing remarkably bad faith by forging ahead with the knowledge that the federal courts would be bound to follow Supreme Court precedent when an enforcement action would inevitably be brought.

<sup>171</sup> Cf. *Prof'l Ass'n of Coll. Educators v. El Paso County Cmty. Coll. Dist.*, 730 F.2d 258, 273-74 (5th Cir. 1984) (noting that an injunction that extends protection to persons who are not parties is not overbroad "if such breadth is necessary to give prevailing parties the relief to which they are entitled").

<sup>172</sup> In fact, prevention of repetitious litigation has historically been justification for the use of injunctions, though the original concern was one of convenience for the parties, not the courts. See *supra* note 72.

<sup>173</sup> See *Bresgal*, 843 F.2d at 1170 ("To shop in a number of court of appeals in hopes of securing favorable decisions is not only wasteful of overtaxed appellate resources but dissipates agency energies as well." (quoting *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 912 & n.1 (3d Cir. 1981))).

an important prudential consideration, and that principle is often cited as a reason for limiting the scope of relief.<sup>174</sup> When the courts do cite authority to show that narrow relief would potentially invite unnecessary agency nonacquiescence, the cases tend to be from a series of federal decisions in which state agencies or private individuals have been enjoined in employment discrimination actions.<sup>175</sup>

Third, the courts often argue that limiting relief to the parties before the court will create administrative difficulties.<sup>176</sup> That concern, however, is probably best confided to the agency's discretion. If the agency cannot maintain the program while observing a narrower injunctive order, then the agency has the option to voluntarily suspend its program. Although there may be no practical difference in outcomes, there is a prudential difference that should be acknowledged by the courts. As the Ninth Circuit held in a case narrowing the district court's injunction, "[t]he burden is on the [agency] to comply; as a *practical* (but not legal) matter, the [agency] may have to end its challenged practices entirely to avoid the possibility of violating the injunction and being sanctioned for contempt."<sup>177</sup>

Taken together, these concerns suggest a solution that ties in with the dissent in *Lujan*. If a plaintiff successfully challenges a rule of "broad applicability," then the relief, the invalidation of the rule, will naturally extend to persons beyond the named plaintiffs.<sup>178</sup> Thus, in cases where an administrative regulation has been held unlawful, the "ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."<sup>179</sup> This principle may apply beyond rules of broad applicability, and a better formulation might be that the appropriate relief is only discernible in light of the goals that the court (and the litigants) hope to achieve. If the goal of

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<sup>174</sup> Cf. *id.* at 1169–70 (recognizing that "agencies have sometimes been allowed to confine a ruling by one court of appeals to that circuit, and continue to enforce their own interpretation of the law elsewhere").

<sup>175</sup> *E.g., id.* at 1169–71. It is misleading, however, to cite these decisions for the proposition that prevention of duplicative litigation is a legitimate goal. The parties bound in these cases were not federal agencies, but rather private companies or state agencies with no legitimate prerogative of intercircuit nonacquiescence. Also, in order to find discrimination, the courts must first find systemic wrongdoing. In such situations, broad relief is not only appropriate, but also necessary to remedy the harm.

<sup>176</sup> *E.g., Zepeda v. INS*, 753 F.2d 719 (9th Cir. 1983).

<sup>177</sup> *Zepeda*, 753 F.2d at 729 n.1.

<sup>178</sup> See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting).

<sup>179</sup> *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). Quoting *Harmon* is somewhat misleading in this instance, since that court was concerned not about narrowing the relief generally, but about narrowing the relief in a way that avoided suggesting judicial rewriting of agency regulations. See *Harmon*, 878 F.2d at 495 n.20. Thus, the court was concerned not with intruding into the business of other circuits, but with regulating the functions of the agency.



the court is, for example, an end to segregation in public transportation,<sup>180</sup> it will be impossible to issue an injunction that confines relief to the parties before the court.<sup>181</sup> Narrow relief, in that situation, would not be calculated to achieve the desired goal.<sup>182</sup> This is why we find many examples of necessarily broad injunctions in the civil rights context. In other contexts, the goal of the litigation will not demand such broad relief. For example, if the court wishes to enjoin the government from entering into a certain contract because of illegal bidding practices,<sup>183</sup> the injunction is properly limited to the parties protesting the contract in question.<sup>184</sup>

## 2. Cases Arguing Against Broad Relief

The cases arguing against broad relief tend to sound in the high tones of judicial restraint,<sup>185</sup> expressing fears of judicial usurpation.<sup>186</sup> In general, however, the arguments invoked against broad relief bear a striking resemblance to those advanced in support of broad relief. In many instances, the cases and basic principles cited on both sides of the debate are exactly the same. This highlights one problem that has been lurking throughout this discussion: The principles cited by the courts tend to be vague, and their decisions generally avoid stating outright the various concerns that shape these propositions into a specific decree.

Courts arguing for narrower relief tend to begin by reciting *Califano's* proposition that injunctions "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."<sup>187</sup> Again, this is an important consideration, but on its own it proves nothing, and cases arguing for broad relief cite the same

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<sup>180</sup> See, e.g., *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963) ("Appellants do not seek the right to use those parts of segregated facilities that have been set aside for use by 'whites only.' They seek the right to use facilities which have been desegregated . . .").

<sup>181</sup> See *id.* at 206-07 (reasoning that if the challenged segregation policies were deemed unconstitutional, the scope of relief could not be limited to the plaintiffs alone).

<sup>182</sup> This is, of course, not the place for a discussion of whether or not such a goal is proper. That is well-trodden territory. See generally Fiss, *supra* note 9 (praising the development of the use of injunctions in civil rights litigation); GRAGLIA, *supra* note 123 (criticizing the use of injunctions in school desegregation).

<sup>183</sup> See, e.g., *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875 (3d Cir. 1986) (modifying the district court's injunction as overly broad).

<sup>184</sup> See *id.* at 890 ("While it was within the constitutional power of the court to grant broader relief, jurisprudence governing injunctive remedies will not permit it.").

<sup>185</sup> See, e.g., *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983) (stating that a federal court "may not attempt to determine the rights of persons not before the court").

<sup>186</sup> See, e.g., *Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 394 (4th Cir. 2001) ("We would in effect be imposing our view of the law on all the other circuits." (citing *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1988))).

<sup>187</sup> *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

proposition.<sup>188</sup> The courts arguing for narrow relief seem to emphasize the words “no broader than necessary,” while the courts arguing for broad relief tend to focus on the phrase “complete relief to the plaintiffs.”<sup>189</sup> The two phrases taken together, as they should be, suggest a balancing of interests.<sup>190</sup> The cases that have cited this proposition, however, have rarely undertaken an explicit balancing of interests.

In addition, courts granting narrower relief often cite *Mendoza’s* argument that allowing one circuit to determine the law of other circuits will “substantially thwart the development of important questions of law,”<sup>191</sup> depriving the Supreme Court of the benefit of more than one instance of appellate review.<sup>192</sup> The underlying principle here is the agency prerogative of intercircuit nonacquiescence—the “well-settled principle in the federal court system that decisions in one circuit are not binding on district courts in another circuit.”<sup>193</sup> Of course, this presents a problem in cases involving a properly certified nationwide class, where the Supreme Court has held that nationwide relief is proper.<sup>194</sup> Thus, the question becomes whether there is a practical difference between a proper class action with a nationwide class and an injunction that specifies nationwide relief to the parties and similarly situated nonparties alike. The answer is that there are important differences, none of which are dispositive, but all of which should be considered by a court before issuing broad relief against federal agencies.<sup>195</sup>

Many of the cases arguing for narrower relief tend to offer only the most conclusory reasons for denying class-wide relief. For instance, in the oft-cited *National Center for Immigrants Rights, Inc. v. Immi-*

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<sup>188</sup> See, e.g., *Bresgal*, 843 F.2d at 1170 (citing *Califano* yet arguing for broad relief); *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963) (granting broad injunctive relief that extended to all similarly situated persons).

<sup>189</sup> Compare *Bresgal*, 843 F.2d at 1170 (citing *Califano*, and then noting that “there is no bar against class-wide, and nationwide relief in federal district or circuit court when it is appropriate”), with *Zepeda*, 753 F.2d at 728 (citing *Califano*, and yet noting that “injunctive relief should be normatively tailored to remedy the specific harms shown by plaintiffs”).

<sup>190</sup> In *Califano*, for instance, the Court carefully analyzed the competing interests before arriving at the conclusion that class-wide relief was appropriate. See 442 U.S. at 698–703.

<sup>191</sup> *United States v. Mendoza*, 464 U.S. 154, 160 (1984). For cases citing this proposition, see, for example, *Virginia Society for Human Life, Inc.*, 263 F.3d at 393, and *Right to Life of Dutchess County, Inc. v. Fed. Election Commission*, 6 F. Supp. 2d 248, 253 (S.D.N.Y. 1998).

<sup>192</sup> See *Mendoza*, 464 U.S. at 160.

<sup>193</sup> *Right to Life of Dutchess County*, 6 F. Supp. 2d at 253 (citing *United States v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994)).

<sup>194</sup> See *Califano*, 442 U.S. at 701–03. The *Califano* court explained: “Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.” *Id.* at 702.

<sup>195</sup> See *infra* Part III.B for a discussion of the importance of the class action device.

gration and Naturalization Service<sup>196</sup> (NCIR), the court denied class-wide relief, stating merely: "The INS asserts that in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs. We agree."<sup>197</sup> The court provided no argument of its own to support this statement, and the three cases cited by the court to support this proposition were inapposite. The first cited case<sup>198</sup> involved a *preliminary* injunction<sup>199</sup> against a local school board, not a federal agency,<sup>200</sup> in which the individual plaintiff's claim was moot.<sup>201</sup> The second cited case<sup>202</sup> involved an action in which the federal district court had failed to specify a class and the injunction was held to have failed to remedy the plaintiffs' harm.<sup>203</sup> The third cited case<sup>204</sup> involved a *preliminary* injunction prohibiting one private company from suing another.<sup>205</sup> This is not to say that the result in NCIR is wrong; these distinctions are merely given to illustrate the problem in this area. The problem is that the courts, in fashioning appropriate relief, tend to offer what seem to be merely felt conclusions in reaching a result. Often, the cases cited to support a particular holding could also be read to counsel a contrary conclusion.

Thus, the arguments for and against the administrative injunction tend to be more conclusory than informative. After the shift in the use of injunctions during the civil rights era, it is hard to argue that the courts do not have the power to issue such broad injunctions. Thus, the debate turns to the various prudential concerns that courts should consider when issuing such an injunction. Unfortunately, currently there seems to exist no conceptual framework within which we might be able to evaluate the relative importance of the various prudential concerns in the individual case.

### III

#### THE ADMINISTRATIVE INJUNCTION IN THE CONTEXT OF THE INDIVIDUAL CASE: TOWARD A COHERENT ANALYTICAL FRAMEWORK

This Part attempts to isolate a number of factors that seem to be at play in these decisions, some of which are routinely mentioned and

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<sup>196</sup> 743 F.2d 1365 (9th Cir. 1984).

<sup>197</sup> *Id.* at 1371 (citing three decisions, discussed *infra* notes 198–205 and accompanying text).

<sup>198</sup> *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92 (5th Cir. 1974).

<sup>199</sup> For a discussion about the importance of the type of injunction implemented, see *infra* Part III.A.

<sup>200</sup> For a discussion of the differences between federal and state and local agencies for the purposes of equity jurisprudential debates, see *infra* Part III.A.

<sup>201</sup> *Hollon*, 491 F.2d at 93.

<sup>202</sup> *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974).

<sup>203</sup> *Id.* at 1366, 1370.

<sup>204</sup> *Tape Head Co. v. RCA Corp.*, 452 F.2d 816 (10th Cir. 1971).

<sup>205</sup> *Id.* at 818–19.

some that are never mentioned. In particular, this Part identifies nine factors (eight factual situations and one procedural concern) that should be considered by a court when assessing the appropriate scope of an injunction against a federal agency. Hopefully, by bringing these factors to light and putting them into a coherent framework, it will be easier to see the ways in which these factors can be systematically considered when granting the appropriate relief.

#### A. Eight Factual Concerns

The first factor that should concern the courts is the type of party involved in a particular case. Courts should distinguish between injunctions against federal agencies and injunctions against state and local agencies and private parties. For example, injunctions against state agencies raise federalism concerns,<sup>206</sup> as well as abstention issues,<sup>207</sup> that are not present when the defendant is a federal agency. Courts wishing to grant narrower relief commonly cite cases in which federal courts have declined to issue class-wide relief against a state agency, even when the injunctions in the cited cases were narrowed solely for reasons of federal-state relations.<sup>208</sup> Contrariwise, the agency prerogative of intercircuit nonacquiescence, a consideration that is a commonly cited reason for narrowing relief, is not a concern when a federal circuit court enjoins a state agency on a class-wide level. When the issue of a nationwide policy is removed from the equation (as is generally the case when a federal court is enjoining a state agency), the argument for broadening the injunction becomes much easier. Despite this, courts arguing for broad injunctive relief often cite cases involving state agencies and thus do not consider the federal agency prerogative of intercircuit nonacquiescence.<sup>209</sup>

The second consideration is that, when enjoining a government agency, courts should apply a narrowing presumption. The history of

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<sup>206</sup> See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 378 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974); see also *Thomas v. County of Los Angeles*, 978 F.2d 504, 508 (9th Cir. 1992) (citing *Rizzo* for the proposition that there must be a "showing of an intentional and pervasive pattern of misconduct" on the part of state officials before a court will enjoin a state agency).

<sup>207</sup> See, e.g., *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975) (noting that "a federal court should, in all but the most exceptional circumstances, refuse to interfere with an ongoing state [investigation]"); *Younger v. Harris*, 401 U.S. 37, 45 (1971) (explaining that federal courts should generally abstain from enjoining state court proceedings).

<sup>208</sup> See, e.g., *Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1985) (citing, among many other cases, *Doran*, a decision based largely upon the doctrine of federal court abstention and having little to do with the propriety of class-wide relief in the absence of a certified class).

<sup>209</sup> See, e.g., *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1988) (involving an injunction against a federal agency yet supporting its argument by citing cases in which the defendant was either a state agency or a private party); see *supra* notes 174-75 and accompanying text.

equity in general, and injunctions in particular, suggests that these remedies are strong medicine, and should only be prescribed as necessary to achieve just results.<sup>210</sup> As discussed in connection with *Mendoza*,<sup>211</sup> narrower relief is important in preserving the agency's prerogative of intercircuit nonacquiescence, but such a consideration is not always dispositive.<sup>212</sup> Almost every recent federal court case discussing the appropriate scope of an injunction cites *Califano* for the proposition that injunctions should be narrowed as much as possible, taking into account the extent of the injury to be remedied.<sup>213</sup>

A third factor to consider is whether the challenge to the agency rule or action is facial or as-applied. The arguments of the *Lujan* dissent should come into play only when the court has struck down an agency regulation or an entire administrative program. Otherwise, countervailing considerations, such as the narrowing presumption, might counsel against broad relief when the injury lies in unlawful application of an agency regulation.<sup>214</sup> Cases arguing for broad relief, where the challenge is to a rule as-applied, often cite decisions in which the challenge was facial. This consideration also ties in with the *Califano* proposition that the courts should be clear on the purpose of the injunction when setting its scope.<sup>215</sup>

The fourth consideration that courts should take into account is the nature of the right being vindicated. First Amendment claims should not be treated in the same way as due process claims. Civil rights cases involve different remedial considerations than tax disputes. This ties in again with the scope of injury consideration. Some substantive legal areas may warrant broad relief, even where the party's individual injury might be remedied by a narrower injunction.

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<sup>210</sup> See Maitland, *supra* note 10, at 254–60 (tracing the development of the injunction in the English Court of Chancery). But see Fiss, *supra* note 9, at 1–6 (suggesting that injunctions should no longer be at the bottom of the remedial hierarchy).

<sup>211</sup> See *supra* notes 131–38 and accompanying text.

<sup>212</sup> See, e.g., *Belitskus v. Pizzigrilli*, 343 F.3d 632, 651 (3d Cir. 2003) (“Continued case-by-case litigation of the Commonwealth’s attempts to collect filing fees from indigent candidates will not serve the interests of the candidates, the Commonwealth, or its voters.”).

<sup>213</sup> Almost every case discussing the administrative injunction cites this narrowing “presumption.” See, e.g., *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004); *Sharpe v. Cureton*, 391 F.3d 259, 273 (6th Cir. 2003).

<sup>214</sup> See, e.g., *Meinhold v. U.S. Dep’t of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994). Citing *Califano*’s narrowing presumption, the *Meinhold* court limited the scope of relief by ordering the plaintiff’s reinstatement into the military, while declining to enjoin the Department of Defense from enforcing similar regulations against other military personnel. *Id.*

<sup>215</sup> See, e.g., *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963). The *Bailey* court was clear that it was offering broad relief because the remedial goals were broad, stating that “[t]he very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated.” *Id.*; see also text accompanying notes 155–56 (discussing *Lujan*’s approach to tailoring the proper scope of relief).

For instance, many First Amendment cases are concerned with the chilling effect of government-imposed speech regulations.<sup>216</sup> When a court strikes down a regulation on First Amendment grounds, class-wide prospective relief may be especially appropriate in protecting the free speech rights of persons not before the court. Class-wide injunctions are often an important part of civil rights litigation, both for institutional reform and for cases brought under the Civil Rights Act.<sup>217</sup> Due to the particularity of the underlying substantive law, such cases should not be cited for the general proposition that class-wide relief is appropriate in the absence of a certified class.

The fifth concern is the type of injunction at issue: the order may be mandatory or prohibitory, and its duration varies depending upon whether it is a permanent injunction, preliminary injunction, or temporary restraining order. Each type of injunction presents different issues that the court must consider in setting the appropriate scope of relief. Preliminary injunctions, for example, are generally issued upon an incomplete presentation of evidence and before the court has fully considered the merits of the case;<sup>218</sup> their function is to preserve the status quo.<sup>219</sup> Thus, preliminary injunctions should be presumptively narrower (i.e., less burdensome to the defendant) than permanent injunctions granted after a full hearing and decision on the merits.<sup>220</sup> Some courts have argued that preliminary injunctions should be subject to less scrutiny because of the temporary and emergent nature of such relief.<sup>221</sup> This contention, however, confuses reviewing the *scope* of the injunction and reviewing the *propriety* of such

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<sup>216</sup> See FIELD, *supra* note 2, at 324 (

Freedom to speak when there is the will to speak is worth more than later assurances that the freedom to speak is constitutionally guaranteed and the enforced silence an error. The will and time to speak having passed, the value of the right, both to the individual and to society, has been reduced greatly.

). There are also prior restraint concerns where injunctions have the effect of chilling speech. See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (arguing that injunctions affecting intellectual property rights implicate the prior restraint doctrine); Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 330–32 (2001) (discussing injunctions barring labor-related expression in the early twentieth century).

<sup>217</sup> For a discussion of the importance of class-wide injunctions to civil rights litigation, see generally Fiss, *supra* note 9. Sometimes, of course, narrow relief is appropriate in civil rights cases. See, e.g., *Meinhold*, 34 F.3d at 1480.

<sup>218</sup> See STORY, *supra* note 30, at 367–68.

<sup>219</sup> See *id.* at 367.

<sup>220</sup> See *id.*

<sup>221</sup> See, e.g., *Thomas v. County of Los Angeles*, 978 F.2d 504, 512–16 (9th Cir. 1992) (Orrick, J., dissenting) (arguing that the court should have granted a preliminary injunction by applying a less rigorous standard than that required for a permanent injunction).

relief in the first place.<sup>222</sup> Because it is easier, as an evidentiary matter, to obtain a preliminary injunction, courts should conduct a more searching inquiry into the appropriate scope of such an order. Thus, on appeal, the review of the grant of the preliminary injunction should be more limited, while the review of the scope of the relief should be more searching. Finally, prohibitory injunctions are generally less intrusive than mandatory injunctions; courts should also be aware of this distinction when reviewing the propriety and scope of such injunctions.

A sixth factor is the type of agency or agency action the litigants are challenging. The courts tend to show a high degree of deference to law enforcement agencies, and this deference seems to influence the courts' decisions to narrow the scope of injunctions that might otherwise be acceptable.<sup>223</sup> When courts cite these cases in later decisions that do not involve injunctions against law enforcement agencies, they must give due regard to the different factual background. As is the case with law enforcement agencies, courts often given a high degree of deference to the decisions of prison administrators. Although the Supreme Court has held that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,"<sup>224</sup> the courts have sanctioned certain restrictions on inmates' conduct that are acceptable only in the corrections context.<sup>225</sup> Many cases exhibiting similar deference involve the Immigration and Naturalization Service, as immigration law implicates many sensitive issues which may affect a court's decision in setting the appropriate scope of relief.

A seventh factor, venue restrictions, is more obscure but equally important. Because organic statutes often confine review of agency action to particular venues, a court must consider the impact an injunction might have on its own docket. For instance, in *National Mining Ass'n v. U.S. Army Corps of Engineers*,<sup>226</sup> the D.C. Circuit Court approved class-wide relief in the absence of a class action. The court

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<sup>222</sup> See *Zepeda v. INS*, 753 F.2d 719, 724 (9th Cir. 1983) (holding that review of preliminary injunctions is "much more limited" than the review afforded to permanent injunctions, but failing to distinguish between reviewing the propriety of the injunction and reviewing its scope).

<sup>223</sup> See, e.g., *Sharpe v. Cureton*, 319 F.3d 259, 273-74 (6th Cir. 2003); *Thomas*, 978 F.2d at 509. But see *Allee v. Medrano*, 416 U.S. 802, 815 (1974) ("Where, as here, there is a persistent pattern of police misconduct, injunctive relief is appropriate.").

<sup>224</sup> *Turner v. Safley*, 482 U.S. 78, 84 (1987).

<sup>225</sup> See, e.g., *Washington v. Reno*, 35 F.3d 1093, 1099-100 (6th Cir. 1994) (analyzing how prisoners' ability to communicate with those on the "outside" may be constitutionally regulated); see also *Washington v. Harper*, 494 U.S. 210, 223-24 (1990) (discussing, inter alia, the deference that courts should afford to prison administrators when reviewing policy decisions).

<sup>226</sup> 145 F.3d 1399 (D.C. Cir. 1998).

expressed fear that a narrower ruling would generate a flood of duplicative litigation because venue rules would force many would-be plaintiffs to seek review in the D.C. Circuit Court.<sup>227</sup> The court conceded that "[t]he resulting gap in the effective scope of the nonacquiescence doctrine appears to be no more than an inevitable consequence of the venue rules in combination with the APA's command that rules 'found to be . . . in excess of statutory jurisdiction' shall be not only 'h[e]ld unlawful' but 'set aside.'"<sup>228</sup> Thus, a court's consideration of the scope of review of an agency action may legitimately inform the scope of an injunction.

The eighth factual concern is that a court should distinguish, in arguing for narrower relief, the type of narrowing to be done. In some instances, tailoring the injunction to remedy a specific statutory defect will result in a court essentially rewriting a regulation.<sup>229</sup> In such cases, broader relief invalidating an entire regulation will force revision by the agency itself, thus avoiding judicial legislation.<sup>230</sup> In other situations, narrowing relief to remedy a specific harm will not cause the court to rewrite a regulation; in such instances, narrower relief may be more appropriate.

#### B. One Important Procedural Consideration

As the ninth and final consideration, courts should consider the boundaries of the class of potentially affected nonparties. Court opinions contending that class-wide relief should be unavailable in the absence of a certified class have improperly relied upon cases where class certification was denied.<sup>231</sup> While the denial of class certification itself suggests that class-wide relief is inappropriate in *that* particular case, it does not mean that class-wide relief is inappropriate in any case absent a certified class. In some cases, a class may be readily ascertainable and of relatively static membership. In other situations, the class may be so broad, diverse, and numerous that class-wide injunctive relief approaches legislative action. In any situation, the court should consider the difficulty in ascertaining the extent of the class and potential nonparty effects, much as a court would do in certifying a class. If, for example, the class of potential beneficiaries would be relatively small or easily defined, and if the members before the

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<sup>227</sup> *Id.* at 1409–10.

<sup>228</sup> *Id.* at 1410 (quoting 5 U.S.C. § 706(2)(C)).

<sup>229</sup> *See, e.g.,* Harmon v. Thornburgh, 878 F.2d 484, 494–95 (D.C. Cir. 1989) (noting the "fundamental principle that agency policy is to be made . . . by the agency itself—not by courts").

<sup>230</sup> *See id.* at 495–96.

<sup>231</sup> *See, e.g.,* Zepeda v. INS, 753 F.2d 719, 728 n.1 (1964) (citing cases).



court would adequately represent them, then certification of a class may not be as important.<sup>232</sup>

Surprisingly, some courts seem to overlook, or explicitly disregard, the many procedural safeguards in the class certification process.<sup>233</sup> However, when a court decides whether class-wide relief is appropriate in the absence of a certified class, these procedural and practical matters should be taken into account. Rule 23 of the Federal Rules of Civil Procedure, which governs the class action, contains provisions that are important to both party defendants and to potentially affected nonparties as well.<sup>234</sup> Under the Rule, the court is required to ensure that class representatives will adequately represent absent members' interests,<sup>235</sup> and the Rule provides the court with broad powers to issue orders protecting the class members.<sup>236</sup>

Furthermore, courts in administrative injunction cases often overlook the benefit of repose to the defendant in a class action. Party plaintiffs and absent class members alike are bound with respect to a defendant in a class action. Thus, because class actions tend to involve greater downside potential than non-class actions, a defendant can, and generally will, commit greater resources to defending a class action lawsuit. Where there is no formal class action, yet there is the potential for class-wide injunctive relief, the defendant must defend the action with the resources that would be dedicated to defending a class action, yet the winning defendant does not benefit from the res judicata effect on nonparty class members. Even if the plaintiffs in a non-class action achieve class-wide injunctive relief, the potential nonparty beneficiaries are free to sue on the same grounds for different relief.

Aside from these safeguards inherent in the class action, other procedural incidents deserve mention. For instance, discovery in a class action is much broader than in non-class actions.<sup>237</sup> In the case

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<sup>232</sup> See, e.g., *Bangert v. Hodel*, 705 F. Supp. 643, 650 (D.D.C. 1989) (finding that "[t]he plaintiffs before the [c]ourt are sufficiently representative of the class").

<sup>233</sup> See, e.g., *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973) ("[I]nsofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs."). But see *Gregory v. Litton Systems, Inc.*, 472 F.2d 631, 633 n.4 (9th Cir. 1972) ("And we can not hold, as the *amici* urge, that Rule 23 is a meaningless formality which this court should disregard.").

<sup>234</sup> See FED. R. CIV. P. 23.

<sup>235</sup> See, e.g., FED. R. CIV. P. 23(a)(4), (e). There are no notice requirements for class actions brought under Rule 23(b)(2), the provision allowing for class-wide injunctions. See FED. R. CIV. P. 23(c).

<sup>236</sup> See FED. R. CIV. P. 23(d); *Yaffe v. Powers*, 454 F.2d 1362, 1367 (1st Cir. 1972) ("The genius of Rule 23 is that the trial judge is invested with both obligations and a wide spectrum of means to meet those obligations.").

<sup>237</sup> See FED. R. CIV. P. 23 (laying out federal procedure for class actions).

of administrative injunctions, where class-wide relief is available in the absence of a certified class, the defendant may be unable to obtain discovery from nonparties who stand to benefit from a win by a party plaintiff. Furthermore, the practical concern of enforcement remains. When the plaintiff wins class-wide relief in a non-class action, who has the right to bring an enforcement proceeding if the defendant disobeys the injunction as to a benefited nonparty? Must the party plaintiff bring the enforcement proceeding? May a nonparty beneficiary bring the enforcement proceeding? Could either person bring such an action? Thus, it is clear that the class action designation is no mere formality. The courts need to move from a binary approach to a more sensitive analysis of how the class certification procedure may allow more fair and manageable relief for the parties and potentially affected nonparties.

In some sense, underlying the arguments for and against broad relief in these specific cases are the court's own views on the nature and function of the judge's inherent remedial powers.<sup>238</sup> As the regulatory state increasingly saturates private activities, the need for courts to draw lines between public law and private rights becomes evident.<sup>239</sup>

#### CONCLUSION

This Note does not purport to offer a blanket rule for or against administrative injunctions. In some situations, nationwide and class-wide relief seems clearly appropriate, and it is now beyond question that federal courts have the power to issue such decrees. In other situations, however, policy development is best left to the competence of the administrative agency. Some courts have given a nod to these concerns, yet most generally fail to address the propriety of administrative injunctions in a coherent fashion. In sorting out the guiding principles, this Note has attempted to show that a framework of considerations may be imposed upon this messy business. A more systematic approach to this extraordinary relief would no doubt increase administrative and judicial efficiency by providing potential litigants with clearer expectations regarding public law litigation in the federal courts.

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<sup>238</sup> For a discussion of the remedial powers of judges, see Fiss, *supra* note 118; Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

<sup>239</sup> See generally FIELD, *supra* note 2 (examining the effects of unconstitutional statutes and advocating for greater judicial review of such statutes). Interestingly, Field published his book in 1935, *see id.* at iv, on the heels of the New Deal. His analysis seems to be cautiously aware of the burgeoning regulatory state.

